No. 86-944

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

EUGENE SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court effectively denied petitioner's compulsory process for obtaining witnesses in his favor by ruling that judicial character witnesses were cumulative.

2. Whether the court denied petitioner's right to due process by allowing him to be improperly cross-examined where his credibility was crucial.

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No.

In The

Supreme Court of the United States

October Term, 1986

EUGENE SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Eugene Sullivan respectfully prays to this Honorable Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, which affirmed his judgment of conviction entered upon a jury verdict of guilty.

OPINION BELOW

The judgment order of the United States Court of Appeals

for the Third Circuit was entered on October 8, 1986, and is annexed hereto (Appendix, 1a). This petition for a writ of certiorari was filed within sixty days of that date.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an imparial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted by witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Procedural History

On November 26, 1985, petitioner was found guilty of 14 counts of a violation of the Hobbs Act and one count charging him with conspiracy. He was found not guilty of 15 other outstanding counts charging him with Hobbs Act violations.

On February 10, 1986, final judgment of sentence of 13 years

imprisonment and a $105,000 fine was imposed upon petitioner.

On October 8, 1986, the Court of Appeals for the Third Circuit affirmed the judgment of the District Court.

B. Concise Statement of Facts

Petitioner is a 63 year old former Chief Inspector who served in the Philadelphia Police Department for 34 years. He was charged with commanding a division of the Philadelphia Police Department wherein various people made regular payments to members of his staff. Only two of eighteen government witnesses testified that they personally handed money to the petitioner and this only on isolated occasions.

Petitioner denied the allegations and testified on his own behalf regarding his attempts to enforce the vice laws within this particular division during the three years he was assigned there. The remaining witnesses testified only that they took or received money from racket figures in return for protection. No one testified that the petitioner ever indicated or asked them not to enforce vice laws.

The petitioner presented character testimony in his defense. In preparation for trial at least ten members of the Court of Common Pleas and the Municipal Court in Philadelphia indicated a willingness to testify as character witnesses for the petitioner if they were permitted to do so. These were people who had known the petitioner for many years, pre-dating their election to the bench and knew of his many acts of community service. None of them had served as judicial officers in matters involving the petitioner's testimony in their courts.

The Supreme Court of Pennsylvania requires permission to be sought before judges may testify as character witnesses. A

petition was filed before this court and was summarily denied with but one dissent on November 8, 1985.

In spite of this denial the District Court permitted the petitioner to issue subpoenas to the ten judges involved. However, following the issuance of the subpoenas the court required petitioner's counsel to call non-judicial character witnesses first and after 51 such persons appeared, ruled that the judicial character witnesses' testimony would be cumulative and refused to permit them to testify.

During cross-examination the prosecution questioned the petitioner about the accuracy of federal income tax forms and financial disclosure forms he had filed. Objection was promptly made that these were collateral matters but in spite of that, the government was permitted to elicit the fact that the petitioner had not reported income from the rental of propery he owned in a nearby New Jersey resort. He explained that he did not do so because the expenses of the property exceeded the income and, therefore, he had no "net income". Over strenuous and continuing objection the government was permitted to fashion this failure into admitted acts of untruthfulness upon the part of the petitioner.

An overview of the lack of evidence and the jury's verdict which found the petitioner not guilty of half of the charges indicates the importance of the petitioner's credibility in this case.

REASON FOR GRANTING THE WRIT

I.

The court, under the guise of directing the order of evidence and prohibiting cumulative testimony has denied the petitioner his right to call witnesses in his own behalf.

The supervisory power of any judicial system to regulate the appearance of judges as witnesses for the defendant has been focused upon with intensity in this decade. In this instance, the Supreme Court of Pennsylvania, without hearing any reasons why judicial character testimony should be allowed in this case, arbitrarily denied the petitioner of his right to call these witnesses. The District Court recognized the basic unfairness of this proceeding when it ruled that every defendant does, indeed, have a right to subpoena witnesses on his own behalf and order that the judges, nonetheless, be subpoenaed. Very shortly thereafter, however, the District Court, for the very first time in this trial, took upon itself to determine the order of witnesses in spite of strenuous objection from defense counsel.

Presentation of the government's case exceeded five full trial days. Presentation of the petitioner's 51 character witnesses and the presentation of the remaining ten judicial character witnesses would not have exceeded one morning session. The entire defense consumed less than a day and a half.

Petitioner made it quite clear to the District Court that he objected to the court's direction of the order in which he might present his character witnesses. There was absolutely nothing in the conduct of this trial or the conduct of the defense case which called upon the court to exercise any discretion as to how defense witnesses should be presented. Moreover, the court's determination that the judicial witnesses would be "cumulative" because they

would be asked the same question as other character witnesses is absurd when it is understood that all character witnesses must be asked the same general questions regarding their understanding of the defendant's reputation in the community.

It is respectfully submitted that the petitioner has carried his burden of showing that judicial character witnesses was material and favorable to his defense and would have been presented in his defense except for the order of the court. *United States v. Valenzuela-Bernal,* 458 U.S. 858 (1982). The Circuit Court's reliance upon the trial judges' discretion in controlling the admission of evidence cannot overcome this constitutional right.

II.

The court improperly applied Federal Rules of Evidence 611(b) and 608(b) and their own prior rulings in permitting the government to cross-examine the petitioner upon the content of his income tax returns.

The issue presented in the present case is the interpretation of "credibility". As this Court has previously held in *United States v. Able,* ____ U.S. ____, 105 S. Ct. 465 (1984), the government may cross-examine regarding membership in a group pledged to lie in order to show bias and motive to commit perjury on the part of the defendant.

The Third Circuit in *United States v. Pantone,* 609 F. 2d 675 (3rd Cir. 1979), properly applied the principles of *Walter v. United States,* 347 U.S. 62, 74 S. Ct. 354 (1954) in distinguishing between areas that had been specifically denied by defendant in his direct examination and those which had not. They noted at page 681:

> [W]e disapprove of the practice of using cross-

> examination beyond the scope of the direct testimony for the purpose of laying a foundation for the introduction, as rebuttal, of otherwise inadmissible evidence".

The present case does not involve an admission of untruthfulness on the part of a witness. His admission was only that he did not include gross income from the rental of seashore property because the expenses exceeded the income and, therefore, no tax was due. The government, however, was permitted to introduce this as some unspecified violation of the internal revenue laws and then to argue extensively to the jury that such a man would certainly be inclined to lie. The Circuit Court, in acceding to the discretion of the the trial judge, improperly characterized it as an issue of credibility and as such made it admissible under Federal Rules of Evidence 611(b) and 608(b). *United States v. Reed,* 700 F. 2d 638 (11th Cir. 1983); *United States v. Lamberty,* 778 F. 2d 59 (1st Cir. 1985); *United States v. Boroni,* 758 F. 2d 222 (7th Cir. 1985); *United States v. Alfonso,* 759 F. 2d 728 (9th Cir. 1985).

CONCLUSION

For the foregoing reasons the petitioner Eugene Sullivan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

F. EMMETT FITZPATRICK
Attorney for Petitioner

APPENDIX A - OPINION OF THE UNITED STATE COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1137

UNITED STATES OF AMERICA

v.

EUGENE SULLIVAN,
Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
Criminal No. 85-00296-01

Argued September 19, 1986

Before: ADAMS, STAPLETON, and
VAN DUSEN, *Circuit Judges*

(Filed October 8, 1986)

F. EMMETT FITZPATRICK (Argued)
Philadelphia, Pennsylvania
Attorney for Appellant

EDWARD S.G. DENNIS, JR.
United States Attorney
WALTER S. BATTY, JR.
Assistant United States Attorney
MICHAEL R. LAZERWITZ (Argued)
Assistant United States Attorney
Philadelphia, Pennsylvania
Attorneys for Appellee

Appendix A

OPINION OF THE COURT

ADAMS, *Circuit Judge.*

Eugene Sullivan appeals on various grounds from a decision of the District Court for the Eastern District of Pennsylvania finding him guilty of one count of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, and fourteen counts of specific violations of that Act. The violations in question occurred between March 1980 and September 1983, when Sullivan commanded the Northeast Divison of the Philadelphia Police Department. As division commander, Sullivan personally directed a vice lieutenant and an eight-member vice squad responsible for policing illegal gambling and prostitution within the division's boundaries. According to the jury, Sullivan headed a conspiracy among the members of the Northeast Division vice squad to extort money from owners and operators of illegal gambling and houses of prostitution in exchange for police protection.

I.

In March 1980 Sullivan assumed command of the Northeast Division. At Sullivan's request, Lt. Walter McDermott and Officer George Bowie were transferred to his vice squad from the Eastern Division. During their service in the Eastern Division, McDermott and Bowie had actively participated in an organized extortion scheme.

At trial, Bowie testified that the Northeast extortion ring was structured to insulate Sullivan, who supervised the operation. Bowie was the "chief bagman" for two years, routinely collecting at least $10,000 in cash each month from the various vice

operators who had agreed to pay for protection. Bowie reported each month's collection to McDermott, who divided up the proceeds: $4,000 for Sullivan, $2,000 for McDermott, $1,000 for Bowie, and $650 for each of the squad members. In 1982, Bowie and McDermott left the division, but their places were taken by Thomas Volkman, William Maahs and Lt. Bowman, and the extortion ring continued to operate until terminated by the federal investigation.

According to the testimony at trial, on a number of occasions Sullivan personally involved himself with screening vice operators for acceptance of protection money. On one occasion, Sullivan instructed Maahs to "leave [Lester Barry's] machines alone" when Sullivan realized that Barry had been making monthly protection payments to the squad. Moreover, Bowie testifed that the cash received from Robert Sadowl, the owner of one of the largest collections of illegal video poker machines in Philadelphia, was not "cut up with the squad" because it belonged "strictly" to Sullivan. This money from Sadowl alone ranged from $300 to $800 per month.

On August 8, 1985, a federal grand jury sitting in the Eastern District of Pennsylvania returned a 30-count indictment against Sullivan, as well as McDermott, Maahs, John Czman and Robert Schwartz, for violations of the Hobbs Act, 18 U.S.C. § 1951. After a jury trial, Sullivan was convicted of one count of conspiring to extort, and fourteen specific counts of extortion. He was sentenced to 15 concurrent terms of 13 years' imprisonment, and fines totalling $105,000 were imposed on him. The district court suspended execution of the sentence pending this appeal.

Sullivan now raises five objections to his conviction that merit discussion.

Appendix A

II.

A. *The District Court's Exclusion of the Ten State Court Judges as Character Witnesses*

Sullivan sought to call at trial some 61 character witnesses, including ten Pennsylvania state court judges, to attest to his reputation in the community. Rule 1701 of the Pennsylvania Rules of Judicial Administration requires judges to apply for permission from the State Supreme Court before appearing as character witnesses. In accordance with this rule, the judges in question filed a petition to appear on Sullivan's behalf, but the petition was denied by the Pennsylvania Supreme Court on November 8, 1985. In spite of this ruling the district court allowed Sullivan to issue subpoenas to the ten judges, declaring that the sixth amendment gives every defendant the right to subpoena anyone he chooses. At trial, however, the district court directed Sullivan to call all non-judicial character witnesses before calling any judicial character witnesses. In connection with this ruling, Judge Cahn gave the following guidance to Sullivan's counsel:

> I think I have to see how this goes. I want to see where your . . . examination is going to go. But we won't let the character witnesses go on, these are the broad guidelines. We certainly won't devote more than several hours to it at a maximum. Depending on the extent of the character testimony before we get to the Judges, we may not allow the Judges, because it would tend to be cumulative. I'll take an offer of proof from you as to what the Judges would add to what you already presented.

App. 1079a-1080a. Despite this suggestion, counsel called 51 non-judicial character witnesses before calling

the first judge. The district court then called for an offer of proof as to what the ten judicial witnesses would testify; counsel informed the court that each would be asked the same question regarding Sullivan's reputation for truth and veracity that had been addressed to the preceding witnesses. The court prohibited Sullivan from calling the judges on the ground that their testimony would be cumulative.

Sullivan contends that the district court abused its discretion in forcing the defense to present all non-judicial character witnesses first, and then excluding the judges' testimony as cumulative. Sullivan notes that the prosecution consumed at least five full days, while his character witnesses took up only one morning session, so that the judges' testimony would not have delayed unduly the proceedings. But in determining whether exclusion of testimony infringes the sixth amendment right to due process in the type situation we have here, the operative question is not how much time the testimony would consume, but whether the testimony would be cumulative. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). Sullivan provides no evidence to refute the district court's conclusion that the judges' testimony would have duplicated that of the 51 character witnesses allowed to appear. Instead, his counsel argues that the district court's order that non-judicial witnesses appear first, combined with its determination that the judges' testimony would be cumulative, had the effect of limiting his right to call relevant and favorable witnesses.

The Supreme Court has recognized, however, that the trial court has discretion as to the order in which parties adduce proof.

> The trial judge must meet situations as they arise and to do this must have broad power to cope with

> the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof: his determination will be reviewed only for abuse of discretion.

Geders v. U.S., 425 U.S. 80, 86 (1975). We cannot say that the district court abused its discretion in ordering that the non-judicial witnesses appear first. Because there has been no showing that the judges' testimony would have added anything of substance to the character endorsements already admitted by the district court, there was no abuse of discretion in determing that the testimony by the judges would be cumulative.

B. *The Sufficiency of the Evidence*

Sullivan argues that the prosecution did not elicit sufficient evidence to show that Sullivan knowingly joined the conspiracy, or that an overt act was committed in furtherance of the conspiracy. In reviewing the record for sufficiency, this Court must determine whether "there is substantial evidence viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Camiel*, 689 F.2d 31, 35-36 (3d Cir. 1982).

A careful review of the evidence set forth at trial shows that Sullivan's contention is without merit. There was sufficient evidence to conclude, for example: that Sullivan met with Robert Sadowi, a video poker machine kingpin, and personally arranged cash payoffs in exchange for protection from Sullivan's vice squad; that Sullivan personally approved the entry of other vice operators, such as Arnold Arnovitz, Daniel Buckley, and John Catagnus, into the squad's extortion ring; that on another occasion, Sullivan

approved the squad's returning confiscated video poker machines to their owner, Alan Simons, in exchange for Simons's agreeing to pay protection payoffs in the future; that Sullivan made certain that video poker machines belonging to his friend John Kellis were protected; that Sullivan not only accepted cash payoffs from Kellis, but also directed two of his vice officers, Thomas Volkmar and John Czmar, to take steps to ensure that Kellis's machines were not confiscated; and that Sullivan received monthly cash shares of up to $4,000.00 for his overseeing the extortion operation.

C. *Admission of Testimony Concerning Prior Tax Returns and Disclosure Forms*

During cross-examination, the prosecution questioned Sullivan about the accuracy of federal income tax forms and financial disclosure forms he had filed. Sullivan maintains that these matters were collateral matters not raised during direct examination, and therefore inadmissible as evidence.

In the federal courts, the scope of cross-examination permitted is set forth in Federal Rule of Evidence 611(b): "Cross-examination should be limited to the subject matter of the direct examination *and matters affecting the credibility of the witness.*" (emphasis added). Similarly, Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . concerning his character for truthfulness or untruthfulness. . . .

Appendix A

The government contends that Sullivan's fraudulent replies on the forms in question were probative of his truthfulness and therefore admissible. *See United States v. Zandi*, 769 F.2d 229, 236 (4th Cir. 1985) (failure to disclose income on income tax and financial forms probative of truthfulness and admissible); *Carter v. Hewitt*, 617 F.2d 961 (3d Cir. 1980) (where witness concedes alleged acts, they can be used to impeach credibility in cross-examination, even if otherwise extrinsic). As the prosecution points out, Sullivan's direct testimony presented the issue of his credibility to the jury. Sullivan's credibility was in fact the central issue litigated in the case, as the defense presented only Sullivan and the character witnesses during its portion of the trial. The defendant was prepared to stand or fall on the credibility of his own testimony, as supported by character witnesses. Thus it was not error for the district court to allow the prosecution to attack Sullivan's credibility.

D. *The Prosecution's Comment Concerning the Northeast Division Arrest Book and Sullivan's Financial Records*

During the trial, one of Sullivan's co-defendants elicited testimony concerning the date of certain arrests from a bound Northeast Division arrest book. Although only one page from the book was referred to in testimony, the entire book was admitted into evidence without objection. The prosecution also subpoenaed certain financial records of Sullivan. Sullivan stipulated to the authenticity of these records, and was cross-examined about some of them, but no other testimony was heard about them. In its rebuttal, the prosecution referred to both the arrest book and the financial records, and Sullivan's counsel objected for the first time.

Sullivan claims that admission of the arrest book and the other records without any testimony regarding them was error, compounded by references to both the arrest book and the other records in closing argument. But Sullivan cites no authority to support his proposition. He did not object to the admission of the arrest book into evidence until after the book was referred to by the prosecution in its closing argument, so that he has no standing to challenge its admission here. Not only were the financial records in question stipulated to be authentic, but they were introduced after Sullivan answered questions about them during cross-examination. Therefore, Sullivan's objection "that those things have never been referred to by anybody" is mistaken. Once a piece of evidence has been properly admitted, reference to it cannot be error, because the prosecution may "ask the jury to draw permissible inferences from anything that appears in the record." *Oliver v. Zimmerman*, 720 F.2d 766, 770 (3d Cir. 1983) (*per curiam*), *cert. denied*, 465 U.S. 1033 (1984).

E. *The Jury Instructions on Extortion*

In its instructions to the jury, the district court stated that extortion may be established by the receipt of money under color of office. In doing so, it rejected Sullivan's request for an instruction that extortion can be based only on a finding that property was obtained from another whose consent was induced by wrongful use of actual or threatened force, violence of fear. Sullivan contends that the trial court erred in failing to give this instruction, and in giving the instruction on receipt of money under color of office.

As Sullivan concedes, however, the rule for extortion is not as set forth in his suggested instructions, but as in the court's actual instructions.

In this Circuit, extortion may be established by the receipt of money under color of office. *United States v. Jannotti*, 673 F.2d 578, 594-96 (3d Cir. 1982). This Court pointed out in *Jannotti* that a requirement of force, threats or use of fear to distinguish extortion from bribery is not required where public officials are involved. Such a distinction is "not in keeping with the legislative intent" in passing the Hobbs Act. *Jannotti* 673 F.2d at 595.

III.

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit